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No. 85-1846

In The

Supreme Court of the United States

October Term, 1985

FRED B. SHELTON, III and JOHN PAUL JONES,

Petitioners,

vs.

CITY OF COLLEGE STATION, ALBERT MAYO, E. MURL BAILEY, VIOLETTA BURKE COOK, PATRICIA BOUGHTON AND JACK UPHAM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err, and if so, is the error of sufficient importance to justify review by this court, in holding that review of the factual basis for the action of a city's zoning board of adjustment claimed to violate substantive due process is limited to determining whether there was a conceivable rational basis for the board's action?

Should this Court grant Certiorari because it does not accept the rationale of the Court of Appeals opinion when the judgment entered by that Court is correct?

LIST OF PARTIES AND CORPORATE AFFILIATES

The caption on the case as it appears on the cover and at the beginning of the brief contains the names of all of the parties. The only corporation which is a party is the City of College Station, a municipal corporation which has neither parents, subsidiaries nor affiliates.

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THE OPINIONS BELOW

The citations to the opinions below which appear in the Petition for Certiorari[1] are correct. However, the reproduction of the Opinion of the Court of Appeals *en banc* which appears in appendix A to the Petition con-

[1]The Petition for Writ of Certiorari is herein cited as Pet. ——. The appendices to that Petition are cited by the appendix page number as App. ——a.

tains a "summary" preceding the "opinion" which was in the slip opinion but is not reproduced in the report of the opinion at 780 F.2d 475.

The reproduction of the finding of fact and conclusions of law of the District Court in appendix C to the Petition does not include the Judgment of the District Court which contains the Court's ruling on respondent's motion for allowance of attorneys' fees. That is reproduced as appendix A to this brief.

———o———

STATEMENT OF THE CASE

Petitioners sued respondents, a small Texas city, its city planner and four members of its Zoning Board of Adjustment (ZBA), asserting that the failure of the ZBA to grant them variances denied them property without due process of law. The variances, if granted, would have permitted petitioners to operate businesses without complying with the provisions of the City's zoning ordinance requiring businesses to furnish offstreet parking. Petitioners alleged that they were denied substantive due process because the action was arbitrary and capricious, and procedural due process because one of the members of the ZBA who voted against them should have recused himself because he was a member of a church which opposed the granting of the variances and was prejudiced.

Respondents moved for and were granted summary judgment. A panel of the Court of Appeals for the Fifth Circuit reversed that decision, declaring that the summary judgment evidence showed that there was a question

of fact as to whether the board's action was arbitrary or discriminatory that should be resolved in a plenary trial. The Court of Appeals *en banc* reversed that decision, and affirmed the summary judgment with ten judges joining the opinion for the Court and five dissenting.

Petitioners now seek to have this Court issue a writ of certiorari to review that opinion and judgment.

STATEMENT OF FACTS

Petitioners planned to open a pool hall and bar in space in a building that they had leased. That property, located directly across a very busy street from the campus of Texas A & M University, was in a business area referred to as Northgate. There were serious traffic congestion problems in the Northgate area which were aggravated by a shortage of parking space. The City's zoning ordinance required all businesses in that area to furnish specified numbers of offstreet parking spaces, but most of the businesses in the area, operating as non-conforming uses in existence at the time the parking requirements were imposed, did not furnish the required spaces.

Petitioners applied three times to the ZBA for variances that would have permitted them to operate the pool hall and bar, and an additional time for a variance that would permit them to operate an arcade without complying with the requirements for furnishing offstreet parking. They argued to the ZBA that the customers for their proposed businesses would not come by car, but would walk from nearby dormitories. Therefore, they argued,

their proposed businesses would not aggravate the traffic problems in the Northgate area. Although on some of the applications petitioners got three of the five ZBA members to vote to grant them the variances, they were never able to get the four affirmative votes required by the zoning ordinance and the Texas statute.

The Texas statutes provide for prompt appeal to the Texas courts by anyone adversely affected by a ZBA's action. Petitioners made no attempt to use this procedure. Approximately twenty months after the last of their applications was denied petitioners filed this action seeking to recover damages from the City and the individual defendants. The complaint alleged that petitioners were entitled to equitable relief but no attempt was made to urge that claim.

After taking petitioners' depositions, respondents filed a Motion for Summary Judgment supported by affidavits, ZBA records and references to those depositions. Respondents' summary judgment evidence showed that there was a serious parking problem in Northgate, and that the ZBA members who voted against granting the variances believed, and had good reason to believe, that petitioners' business would aggravate that problem. The summary judgment evidence submitted by petitioners was records of the ZBA showing that more than a year after the last of petitioners' applications was acted upon the ZBA granted variances to other businesses in the area, plus depositions of defendants and references to their own depositions. Much of Petitioners' argument was that most of the businesses in Northgate were not complying with the parking requirement, and that their proposed businesses would not have aggravated the traffic problem.

SUMMARY OF THE ARGUMENT

Respondents assert that the only objection petitioners have to the opinion for the Court of Appeals is that it severely restricts the extent to which federal district courts can review the factual basis for a zoning decision when the only real complaint is that that decision was not what the plaintiff wanted it to be.

The Court of Appeals' characterization of the action of a ZBA in passing on a request for a variance as quasi-legislative is correct, but even if it is not the limitation on factual review reached by that rationale is correct and should not be disturbed.

Petitioners do not show any conflict between the circuits. Petitioners assert there is a conflict because cases from other circuits hold that a substantive due process claim can be established by showing arbitrary, capricious or illegal denial of a land use permit. The opinion of the Court below does not question that principle. It uses it as a premise for the prescription of limits on the factual review that a federal court will make to see if it is established, a principle that the cited cases do not discuss.

Neither a variance nor a procedure for getting one is "property". Even if it be assumed, arguendo, that petitioners were denied due process, summary judgment against them was proper because they were not denied "property".

Even if this Court does not agree that factual review of the ZBA's actions should be limited because those actions are quasi-legislative, a more extensive review of

those actions, not limited by that rationale, shows that petitioners were not denied due process.

Apart from the reasons discussed in its opinion, the Court of Appeals' judgment affirming the summary judgment for defendants was correct because (1) the individual defendants are entitled to immunity from personal liability, and (2) the city cannot be held liable for ZBA's denial of variances because that action did not make, nor was it pursuant to, city policy.

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ARGUMENT

1. Introduction

Underlying all of Petitioners' arguments that this Court should review this case is their objection to the opinion for the Court of Appeals because of the limits made clear by that opinion on the review by a federal court of the factual basis for an action by a local zoning agency. In Petitioners' words, the Court's opinion "precludes any meaningful review." (Pet. 11) The petitioners' arguments do not acknowledge that this rule is applied only when the complaint is that the zoning action denied the plaintiff substantive due process.

The essence of the court's opinion to which those arguments are directed is:

> "[The] requirement of *substantive* due process under the Fourteenth Amendment . . . is met if there was any conceivable rational basis for the zoning decision." (emphasis added).

780 F.2d at 477, App. 5a.

The effect of this opinion is to make it possible to dispose of a case quickly when a plaintiff's only real complaint is that a local zoning board did not make the zoning rulings that plaintiff wanted. As soon as it is established beyond question that there is a conceivable rational basis for the board's decision review of the factual basis for that decision ends. The claim of denial of substantive due process can then be disposed of without further waste of the Court's time.

This result the Court reaches by characterizing the ZBA's actions as "quasi-legislative", and holding that the Court must treat the factual basis for the ZBA's action the same as the factual basis for state legislation is treated. That is, if it appears that there is any rational basis for the legislative action the Court's inquiry into the adequacy of the factual basis for the legislation ends.

Petitioners assert that the Court is wrong to treat a ZBA decision like a legislative act because the state of Texas has said ZBA actions are quasi-judicial. The Court's reply is:

> That a state may choose to make a legislative decision by a process that resembles adjudication is not our immediate concern. [footnote omitted]. Our question is whether anything in the fourteenth amendment requires it do so. We have consistently said "no" to that question and we do so again today.

780 F.2d at 481-482 (App. 15a-16a)

The Court acknowledges that there is a school of thought that maintains that when a property right is denied, the plaintiff is entitled to have the factual basis for the board's action reviewed as rational, *vel non,* on the

basis of the reasons stated by the board for the action. While it disagrees with that principle, the Court points out that the application of it would not bring a different result in this case.

2. The Opinion For The En Banc Court Is Correct.

Respondents submit that this Court should not disturb the *en banc* court's opinion because that opinion properly states the law.

The principle that federal courts will set aside a zoning action on a complaint that it takes property without due process of law, i.e., that it denies the plaintiff *substantive* due process, only if the action of the zoning authority is arbitrary and capricious is well established *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982). That principle is not questioned in this case. The only thing that petitioners question is the manner in which the Court's opinion limits the extent to which a federal court may review the facts to determine whether the body which took the zoning action acted arbitrarily or capriciously.

One aspect of the Court's opinion which Petitioners seem to ignore is that the Court's opinion makes it clear the limitation on review resulting from its opinion applies only when the claim is denial of *substantive* due process. The limitation does not apply when there is a claim that procedural due process has been denied, or that any other constitutional or federally protected right has

been violated. Near the beginning of its opinion the Court indicates the limited scope of its opinion by saying that it applies only "In the absence of invidious discrimination, suspect classifying criteria or infringement of fundamental interest, . . .", 780 F.2d at 477 (Pet. 5a).

The Court's opinion also makes it clear that factual review would not be so stringently limited if the complaint should be that procedural due process was denied. In such cases, the opinion says, it would be proper for the Court to require the zoning board to articulate the basis for its action so that a court could determine whether the action taken did in fact have a rational basis.

Respondents submit that this Court should deny certiorari. The opinion of the Court below does not affect the basic legal principle. All it does is make available summary judgment, dismissal on the pleadings and possibly other procedures for prompt disposal of cases in which the plaintiffs only real contention is that on the facts the zoning board should have reached a different result.

Petitioners' contention that it is error for the Court to reach this result by characterizing the action of the ZBA as quasi-legislative because Texas courts have said that ZBA's actions are quasi-judicial, is without merit. It is true that the opinion from a Court of Civil Appeals cited by Petitioners, *Board of Adjustment of City of San Antonio v. Willie,* 511 S.W.2d 591 (Tex.Civ.App., San Antonio, 1974, writ ref'd n.r.e.) describes the ZBA function as quasi-judicial. However, under the interpretation by the Texas Supreme Court of the Texas Zoning Statutes, the extent to which Courts can review the factual basis

for a ZBA's action is less than that allowed in a judicial proceeding and close to that described by the Court below as that given by courts to legislative acts. The Texas Supreme Court has ruled that a ZBA's decision cannot be set aside by a reviewing Court, even if that Court believes that the evidence is overwhelming in favor of granting what the ZBA denied, unless it finds that the ZBA abused its discretion. *City of San Angelo v. Boehme,* 144 Tex. 281, 190 S.W.2d 67 (1945). Fairly recently that Court made a particular point of emphasizing that a statement by a court of civil appeals that review of a ZBA's action should be under the substantial evidence rule is wrong citing *Boehme* as stating the proper rule. *Nu-Way Emulsions, Inc. v. City of Dalworthington Gardens,* 617 S.W.2d 188 (Tex. 1981).

Under Texas law the action of a ZBA is an integral part of the zoning procedure which permits the granting of relief from unnecessary hardships without changing the zoning ordinance. It is not materially different from the action of a city council when the council changes, or refuses to change, the zoning classification of a particular piece of property, which is unquestionably a legislative action. See e.g. *City of Arlington Heights v. Metropoliton Housing Development Corp., supra; Bennett v. City of Slidell,* 697 F.2d 657 (5th Cir. 1983), aff'd in part and reversed on other points 728 F.2d 762, (*en banc* 1984), reh. den'd 735 F.2d 861 (*en banc* 1984), *cert. den'd.* 105 S. Ct. 3249, 87 L.Ed.2d 612.

The essential question is the nature of the decisional process. Is the decision to be made only on evidence produced before the body? If so, a review to determine

whether that evidence is adequate may be appropriate. Or is the decision to be made, as ZBA decisions are, on consideration of information furnished by the parties along with other information from other sources, including the general background knowledge of the board members, and involving evaluation of policy considerations by the board members? As this Court said in a case involving a zoning action on a single piece of property (where the claim that the action was invidiously discriminatory was not established):

> In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations, that courts refrain from reviewing the merits of their decisions absent a showing of arbitrariness or irrationality.

Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, 429 U.S. at 265, 97 S.Ct. at 563.

In another case arising from denial of a liquor license in which a provision of the state statute was held to violate the constitutional requirement for separation of church and state this Court said:

> The zoning function is traditionally a governmental task requiring the "balancing [of] numerous competing considerations," and courts should properly "refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality."

Larkin v. Grendel's Den, Inc., supra, at 459 U.S. 121, 103 S.Ct. at 509.

Respondents submit that these statements are just as applicable to the action of a ZBA passing on a request for a variance as they are to a city council passing on an appli-

cation for spot zoning, and that the Court of Appeals' opinion making that clear is a proper statement of the law that should not be disturbed by this Court.

3. There Is No Material Conflict Between The Circuits.

The petitioners assert that the opinion of the Court of Appeals *en banc* is in conflict with opinions from seven other circuits because those circuits "have held that a substantive due process claim can be made out based on arbitrary and capricious or illegal denial of a land use permit." Respondents submit that neither that statement nor the cases cited in support of it establish the existence of any material conflict.

The opinion for the Court below clearly recognizes that if it is established that the action of a ZBA (or any other zoning authority) which takes property from a claimant is arbitrary or capricious, that claimant has a right of action for denial of substantive due process. The opinion for the Court spells out the limit to which the courts may go in reviewing the facts to determine whether the zoning action was arbitrary or capricious, but that does not show a conflict. In none of the cases cited by petitioners is there any discussion of the extent to which the factual basis for the zoning board's decision will be reviewed by the Courts which conflicts with the principle the Court adopts.

Rogin v. Bensalem Township, 616 F.2d 680 (3rd Cir. 1980), *cert. den'd sub nom. Mark-Garner Associates v. Bensalem Township,* 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981), affirmed dismissal of the plaintiff's action on the pleadings. *Scott v. Greenville County,* 716

F.2d 1409 (4th Cir. 1983) is not a decision on substantive due process. It involved a question of whether racial discrimination was a basis for the zoning action. *Wilkerson v. Johnson,* 699 F.2d 325 (6th Cir. 1983) is not a land use case. It deals with denial of a barber's license. It is not a substantive due process case. The claim was that the official who caused the license to be denied had a personal interest in seeing that that plaintiff was not licensed.

Scudder v. Town of Greendale, 704 F.2d 999 (7th Cir. 1983) is similar to the instant case in that the Seventh Circuit affirmed a summary judgment against the plaintiff. There was no indication that there should be any further examination of the facts by the district court. The opinion includes the statement found in a number of other cases, "It is not the function of federal district courts to serve as zoning appeal boards." *Id.* at 1003.

In *Southern Cooperative Development Fund v. Driggers,* 696 F.2d 1347 (11th Cir.), *cert. den'd,* 463 U.S. 1208 (1983), a substantive due process claim was recognized, but the point at which the inquiry into the factual basis for the action would have ceased under the instant case was never reached. There was never any showing of a valid basis for the zoning agency's action. *Shenk v. Zoning Commission,* 142 App. D.C. 267, 440 F.2d 295 (D.C. Cir. 1971) affirmed a finding by the district court that denial of a request for a change of the zoning classification was arbitrary and capricious. It was, however, in the context of affirming a mandatory injunction to require the commission to change the zoning classification on evidence that included a recommendation by the zoning advisory counsel that such a change be made because eleven similar parcels

had been so rezoned. The following statement from the court's opinion, far from indicating a conflict, is substantially the same position as that set forth in the opinion for the Court below in the instant case:

> True, the zoning commission, a quasi-legislative body, is not required to make findings of fact, and its actions are entitled to a presumption of validity; but when a complaint makes a factual showing indicating that one of its actions is arbitrary, that action cannot be sustained unless the commission puts forward, *or the court is otherwise able to discern,* some basis in fact and law to justify the action as consistent with reasonableness. (emphasis added).

440 F.2d at 297-298.

Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) did reverse a summary judgment in favor of the city against the landowner denied a building permit and order consideration of a claim which was characterized as a claim for denial of substantive due process. There was considered as a part of that claim, however, what was actually a procedural due process claim. That was the assertion that the building permit had been denied because landowners refused to comply with an illegal demand that they convey a right of way to the zoning administrator for the city. There was no discussion of the extent of factual review to be given.

4. Petitioners Were Not Denied A Property Right.

The opinion for the Court says "Deprivation by the state of a protected interest in life, liberty or property is prerequisite to a claim for denial of due process. . . . It is not at all clear that the state has deprived Shelton and

Jones of such a property right." 480 F.2d at 479 (App. 9a)

This, apparently, is a reaction to Respondent's contention citing *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) and *Agins v. City of Tiburon,* 447 U.S. 225 (1980) that a variance is not property so that regardless of whether or not due process was afforded them, Petitioners would not have a valid claim under 42 U.S.C. § 1983.

The Court of Appeals avoided dealing with that problem by holding that it was clear that Petitioners were not denied due process. However, if this Court should grant certiorari, it would have to deal, on the record in this case, with the question of whether a variance, or a procedure by which the petitioners could seek one, is "property".

5. The Opinion Of The Court Below Shows That It Reached The Proper Result Even If Its Principal Reasoning Is Not Endorsed.

Even if this Court should not accept the Court of Appeals' rationale that factual review of the basis for its action is to be limited because the ZBA's action is quasi-legislative, the Court's opinion makes it clear that affirmance of the summary judgment was proper. That is done by the portion of the opinion showing that review on the basis of requiring the ZBA to articulate the basis for its decision would result in affirmance of the District Court's action because the records showed that the existence of serious traffic problems in Northgate was unquestioned, and the ZBA members who voted against granting Peti-

tioners the variances they sought had a belief based on reasonable grounds that granting the variances would make that condition worse.

6. The Court's Judgment Was Proper And Required For Reasons Not Discussed In Its Opinion.

A. The Individual Defendants Are Immune From Personal Liability.

Near the end of its opinion the court states "Our holding makes it unnecessary to address defendants' claim of immunity under *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)." (780 F.2d at 485; App. 24a.) That refers to the contentions of the individual respondents, raised in the district court and strongly urged on the Court of Appeals in a contention that the summary judgment for them in their individual capacities should be affirmed, that petitioner cannot recover against them individually because there was nothing to indicate that they did anything other than perform their official duties in good faith and in a proper manner. They are, therefore, entitled to the "limited or good faith immunity" afforded to all government employees.

The only contention that any of the individual respondents did not act entirely properly was the contention that respondent E. Murl Bailey should have recused himself because he was a member of a church that was opposed to the granting of the variance and was personally biased gainst petitioners. The District Court found, and both the panel opinion and the opinion for the Court *en banc* affirmed the finding, that there was no basis for the contention that Bailey was biased against petitioners, and

the fact that he was a member of the church which opposed the granting of the variances was not a violation of petitioners' rights to procedural due process. Consequently, even if this Court should consider that the rationale of the Court of Appeals for affirming the summary judgment is not acceptable, the summary judgment for the individual defendants would have to be affirmed because they are immune from personal liability for their good faith actions in their official capacities. *Harlow v. Fitzgerald, supra, Mitchell v. Forsyth,* — U.S. —, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). See also *K. Pearlman,* SECTION 1983 AND THE LIABILITY OF LOCAL OFFICIALS FOR LAND USE DECISIONS, 23 Urban Law Journal 57 (1982).

B. The City Cannot Be Held Liable For Torts Of The ZBA.

A major contention in the Suggestion for Rehearing En Banc and in the brief of respondents for the *en banc* hearing was that the panel's opinion was contrary to this Court's holdings in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and the interpretations of it in *Bennett v. City of Slidell,* 728 F.2d 726 (5th Cir. *en banc*), *reh. den'd,* 735 F.2d 861 (5th Cir. *en banc* 1984) *cert. den'd,* 105 S.Ct. 3249, 87 L.Ed.2d 612, because the ZBA's action was not in execution of a city policy, and the ZBA had no authority to make policy for the City.

It is submitted that unless this Court departs from the principle established in *Monell, supra,* or goes well beyond the standards for determining who is a policy-

maker for a city indicated in *Pembaur v. City of Cincinnati*, — U.S. —, 106 S.Ct. 1292 (1986), the court would have to affirm the summary judgment in favor of the City. Even if it should somehow find that the ZBA committed a constitutional tort, the City would not be held liable for it.

———o———

CONCLUSION

The court should deny the application for certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-2044

FRED SHELTON, III, et al.,

Plaintiffs,

vs.

CITY OF COLLEGE STATION, et al.,

Defendants.

JUDGMENT

The Motion for Summary Judgment filed by the Defendants in this action came on for hearing before the Court on October 14, 1983. The Court having considered the Motions, briefs and factual data submitted in support of their motion by the Defendants, and the response, briefs and factual data submitted in opposition by the Plaintiffs, and the Court having heard the arguments of counsel and being of the opinion that such motion should be granted, announced from the bench its findings of fact and conclusions of law.

And the Court, having considered the Motion of Defendants' subsequently filed that they be allowed a reasonable attorney's fee to be taxed as costs and paid by Plaintiffs, is of the opinion that the applicable legal standards as set forth in *Hughes v. Rowe*, 449 U.S. 5 (1980) and cases cited therein have not been met, and

therefore Defendants are not entitled to recover attorney's fees.

It is, therefore, ORDERED, ADJUDGED, and DECREED that Defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED, and that Plaintiffs take nothing in their action against Defendants. It is further

ORDERED, ADJUDGED, and DECREED that the Defendants have and recover from the Plaintiffs their costs, not to include attorney's fees.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 19th day of December, 1983.

/s/ Norman W. Black
UNITED STATES
DISTRICT JUDGE